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County of Santa Clara, California

By: _____ Deputy Clerk

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17 SUPERIOR COURT OF THE STATE OF CALIFORNIA

18 COUNTY OF SANTA CLARA

19 SAN JOSE POLICE OFFICERS
20 ASSOCIATION,

21 Plaintiff,

22 v.

23 CITY OF SAN JOSE, BOARD OF
24 ADMINISTRATION FOR POLICE AND
25 FIRE RETIREMENT PLAN OF CITY OF
26 SAN JOSE, and DOES 1-10 inclusive.,

27 Defendants.

28 AND RELATED CROSS-COMPLAINT
AND CONSOLIDATED ACTIONS.

Case No. 1-12-CV-225926

[Consolidated with Case Nos. 112CV225928,
112CV226570, 112CV226574, 112CV227864]

DEFENDANT AND CROSS-
COMPLAINANT CITY OF SAN JOSE'S
OPPOSITION TO SAPIEN, HARRIS, AND
MUKHAR PLAINTIFFS' MOTION TO
STRIKE AND/OR DISMISS CITY OF
SAN JOSE'S MOTION FOR SUMMARY
ADJUDICATION

Date: March 15, 2013
Time: 9:00 a.m.
Dept: 8
Judge: Hon. Peter H. Kirwan

BY FAX

Complaint Filed: June 6, 2012
Trial Date: June 17, 2013

Case No. 1-12-CV-225926

CITY OF SAN JOSE'S OPPOSITION TO PLAINTIFFS' MOTION TO STRIKE

TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION.....	1
II. ARGUMENT	2
A. The Code Of Civil Procedure Does Not Permit Plaintiffs To File A Motion To Dismiss Or Strike Another Party's Motion.....	2
B. Plaintiffs' Motion Should Be Denied Because Plaintiffs Challenge Separate Sections Of Measure B, Each Of Which Constitutes A Separate And Distinct Alleged Breach Of Plaintiffs' Rights.....	3
C. The Case Law Interpreting Section 437c(f)(1) Supports The City, Not Plaintiffs.	6
D. The Recent Amendments To Section 437c Do Not Affect This Case.	8
III. CONCLUSION	10

TABLE OF AUTHORITIES

Page(s)

CASES

<i>Bagley v. TRW, Inc.</i> , 73 Cal.App.4th 1092 (1999).....	6, 7
<i>Garrett v. Howmedica Osteonics Corp.</i> , 211 Cal.App.4th 389 (2012).....	3, 7, 8, 9
<i>Lilienthal & Fowler v. Superior Court</i> , 12 Cal.App.4th 1848 (1993).....	passim
<i>Linden Partners v. Wilshire Linden Associates</i> , 62 Cal.App.4th 508 (1998).....	3, 8
<i>Matheiu v. Norrell</i> , 115 Cal.App.4th 1174 (2004).....	3, 7
<i>Sievers v. Pacific Gas & Electric Co.</i> , 57 Cal.App.2d 455 (1943).....	2
<i>Sousa v. Capital Co.</i> , 220 Cal.App.2d 744 (1963).....	2

OTHER STATUTES

Code of Civil Proc. § 420.....	2
Code of Civ. Proc. § 422.10.....	2
Code of Civ. Proc. § 430.1.....	2
Code of Civ. Proc. § 435.....	2
Code of Civ. Proc. § 436.....	2
Code of Civ. Proc. § 437c(f)(1).....	passim
Code of Civ. Proc. § 438(c).....	2
Government Code § 12940.....	7

1 **I. INTRODUCTION**

2 Plaintiffs in three of five consolidated actions bring a motion to dismiss or strike the City's
3 Motion for Summary Adjudication based on the contention that the City cannot seek summary
4 adjudication of separate sections of Measure B. Plaintiffs' motion should be denied.¹

5 There is no procedure that permits a party to move to dismiss or strike another party's
6 motion, and for this reason alone, the Court should deny plaintiffs' motion. But even if the Court
7 reaches the merits of plaintiffs' motion, there is no basis for plaintiffs' contention that the City's
8 Motion for Summary Adjudication does not address separate "causes of action" or "issues of
9 duty" as authorized by Code of Civil Procedure section 437c(f)(1).

10 Plaintiffs contend that the enactment of Measure B constitutes one cause of action or
11 breach of duty for impairment of contract. But plaintiffs neither challenge all of Measure B, nor
12 seek declaratory or injunctive relief as to the entire measure. Rather, moving plaintiffs (along with
13 other plaintiffs in these consolidated actions) challenge only separate and distinct sections of
14 Measure B. Plaintiffs allege that each section violates their rights for different reasons, based on a
15 separate legal analysis, with different financial impacts on employees and retirees. In short,
16 plaintiffs allege separate wrongs or breaches of contract.

17 Under Code of Civil Procedure section 437c(f)(1), when a plaintiff complains of separate
18 and distinct wrongful acts, or breaches of contract, that would give rise to separate damages, a
19 party may seek adjudication of the alleged wrongful acts or breaches of contract as separate
20 "causes of action" or "issues of duty." The City's Motion for Summary Adjudication does so.
21 The sections of Measure B addressed in the City's motion each stand alone, and adjudication of
22 any one of them would completely dispose of an alleged wrongful act, or breach of contract, and
23 its damages.

24
25 ¹ This motion was filed on February 26, 2013 by Plaintiffs in the Sapien, Harris, and Mukhar
26 actions. On March 1, 2013, plaintiff SJPOA and plaintiff AFSCME filed joinders in support of
27 the motion to dismiss or strike – shortly before the City's opposition was due. The City is filing a
28 separate opposition to the joinders. Both of these "joinders" are untimely. Neither the POA nor
AFSCME obtained judicial leave to file on shortened time and neither filed on the schedule set by
the Court for the motion filed by plaintiffs in *Sapien*, *Harris*, and *Mukar*.

1 This is a consolidated case involving many parties and many legal claims. Plaintiffs
2 cannot prevent the Court from paring down the case by claiming that all alleged wrongs or
3 breaches of contract are part of one cause of action. If this were the law, a plaintiff could control a
4 case, and frustrate the process of summary adjudication, simply by incorporating all alleged
5 wrongs or contractual breaches under one legal cause of action, as plaintiffs did here.

6 **II. ARGUMENT**

7 **A. The Code Of Civil Procedure Does Not Permit Plaintiffs To File A Motion To 8 Dismiss Or Strike Another Party's Motion.**

9 In their opening papers, plaintiffs do not cite the basis for a motion to “dismiss” or “strike”
10 an opposing party’s motion, and no such authority exists.

11 A party may bring a demurrer or motion on the pleadings to dispose of all or part of an
12 opponent’s pleading. Code of Civ. Proc. §§ 430.1, 438(c). But there is no “motion to dismiss”
13 another party’s motion.

14 A party may bring a motion to strike a “pleading.” Code of Civ. Proc. § 435. But the
15 term “pleading” is defined for purposes of section 435 to mean “demurrer, answer, complaint, or
16 cross-complaint.” *Id.*, § 435(a)(2). It does not include “motion.”

17 Similarly, Code of Civil Procedure section 436 permits the Court to strike a pleading, but
18 Code of Civil Procedure section 420 defines pleadings as “the formal allegations by the parties of
19 their respective claims and defenses, for the judgment of the court.” See also Code of Civ. Proc. §
20 422.10 (“The pleadings allowed in civil actions are complaints, demurrers, answers, and cross
21 complaints”). Again, a “pleading” for purposes of a motion to strike does not include a motion.
22 *Sousa v. Capital Co.*, 220 Cal.App.2d 744, 760 (1963) (holding that a motion to amend is not a
23 pleading under Code of Civ. Proc. § 420); *Sievers v. Pacific Gas & Electric Co.*, 57 Cal.App.2d
24 455, 463 (1943) (holding that a “notice of motion to dismiss is obviously not a pleading”).

25 Instead, the proper method for challenging a motion is through an opposition. Plaintiffs
26 admit this in their brief when they acknowledge that their argument “could be raised as a defense
27 to the City’s motion.” (Memo ISO Mot. to Strike at 6:25-27.) Rather than do so, however,
28 plaintiffs attempt to invent a new motion to strike.

1 There is good reason that a party cannot file a motion to strike another party's motion. If a
2 party could bring such a motion, the result would be endless piecemeal litigation. For example,
3 rather than oppose this motion, the City could have brought its own motion to strike plaintiffs'
4 instant motion, on the limited grounds that the instant motion is procedurally improper, resulting
5 in yet another round of briefing. The Court should deny plaintiffs' attempt to create a new
6 procedure and deny plaintiffs' motion.

7 **B. Plaintiffs' Motion Should Be Denied Because Plaintiffs Challenge Separate**
8 **Sections Of Measure B, Each Of Which Constitutes A Separate And Distinct**
8 **Alleged Breach Of Plaintiffs' Rights.**

9 Under Code of Civil Procedure section 437c(f)(1): "A party may move for summary
10 adjudication as to *one or more causes of action* within an action... or *one or more issues of duty*, if
11 that party contends that the cause of action has no merit... or that one or more defendants either
12 did or did not owe a duty to plaintiff or plaintiffs." Code of Civ. Proc. § 437c(f)(1) (emphasis
13 added).

14 Under Section 437c(f)(1), a "cause of action" is not determined by the way a plaintiff
15 pleads its case, but rather constitutes "a separate and distinct alleged wrongful act, even though
16 combined with other wrongful acts alleged in the same cause of action." *Lilienthal & Fowler v.*
17 *Superior Court*, 12 Cal.App.4th 1848, 1855 (1993); accord *Matheiu v. Norrell*, 115 Cal.App.4th
18 1174, 1188 (2004); *Garrett v. Howmedica Osteonics Corp.*, 211 Cal.App.4th 389, 399 n.7 (2012)².
19 In *Lilienthal*, the Court found that two claims of malpractice were subject to summary
20 adjudication because they involved "different and distinct obligations and distinct and separate
21 alleged damages." *Id.* at 1854.

22 Similarly, under Section 437c(f)(1), an "issue of duty" includes an alleged breach of a
23 contractual obligation, which may be decided on summary adjudication, even if it does not dispose
24 of all other claims in an action. *Linden Partners v. Wilshire Linden Associates*, 62 Cal.App.4th
25 508, 519 (1998) (if "a court finds it appropriate to determine the existence or nonexistence of a

26
27 ² In its Joinder, the SJPOA incorrectly claims that review was granted in *Garrett* and that it is
28 consequently unpublished. The City has checked the dockets of the California Supreme Court and
the Second Appellate District, and no review is indicated.

1 duty in the nature of a contractual obligation, it may properly do so by a ruling on that issue
2 presented by a motion for summary adjudication”).

3 Here, plaintiffs claim that specific sections of Measure B constitute individual *wrongful*
4 *acts* and/or *breaches of contract*. Accordingly, under Section 437c(f)(1), the City may bring a
5 motion for summary adjudication as to specific sections to resolve their legality as either
6 individual “causes of action” or “issues of duty.”

7 Plaintiffs claim that their complaints address only one wrongful act or breach of duty – the
8 enactment of Measure B – and therefore contain only one cause of action for impairment of
9 contract. But in fact, their complaints do not attack Measure B as a whole. Rather, the complaints
10 allege only that some sections of Measure B are illegal, each based on a separate legal analysis,
11 and each with different financial impacts on employees and retirees. Accordingly, their
12 complaints include separate alleged wrongs and breaches of contract, individually subject to
13 summary adjudication.

14 **Employee pension contributions.** Section 1506-A of Measure B requires employees
15 (unless enrolled in an alternative retirement plan) to make additional pension contributions in
16 increments of 4% of pay per year, up to 16%, or 50% of the yearly cost of pension fund unfunded
17 liabilities, whichever is less. Plaintiffs complain that the Municipal Code (see Sections 3.28.850,
18 3.28.880, 3.36.1550) requires the City to pay all pension plan unfunded liabilities, and
19 accordingly, Section 1506-A violates employees’ vested rights by requiring them to make
20 additional contributions. (*Sapien* Complaint ¶14(c); *Harris* Complaint ¶12(c); *Mukhar* Complaint
21 ¶14(c).) Based on these allegations, Section 1506-A constitutes a separate and distinct alleged
22 wrong, or violation of contract, that would give rise to separate and distinct damages – additional
23 pension contributions in amounts beginning with 4% of pay.

24 **Employee contributions to retiree healthcare.** Section 1512-A of Measure B requires
25 employees to pay half of all yearly contributions required to fund their future retiree healthcare,
26 including unfunded liabilities. Plaintiffs complain that the Municipal Code (see Sections
27 3.28.385, 3.36.575) does not currently require employees to pay for retiree healthcare unfunded
28 liabilities, and accordingly, Section 1512-A violates their vested rights. (*Sapien* Complaint

1 ¶14(d); *Harris* Complaint ¶12(d); *Mukhar* Complaint ¶14(d).) Again, Section 1512-A constitutes
2 a separate and distinct alleged wrong, or violation of contract, that would give rise to separate and
3 distinct damages – additional employee contributions to pay for 50% of the yearly cost of retiree
4 healthcare unfunded liabilities.

5 **Supplemental Retiree Benefit Reserve.** Section 1511-A discontinues a supplemental
6 retirement benefit reserve, used in the past to pay discretionary benefits in addition to monthly
7 pension benefits, and returns the reserve to the general retirement funds. Plaintiffs complain that
8 the Municipal Code sections authorizing this reserve (Sections 3.28.340, 3.36.580B) created a
9 vested right which is violated by Measure B. (*Sapien* Complaint ¶14(e); *Harris* Complaint ¶12(e);
10 *Mukhar* Complaint ¶14(e).) Again, contrary to plaintiffs’ contentions, the discontinuance of this
11 reserve is a separate and distinct alleged wrong, or violation of contract, that allegedly would give
12 rise to separate and distinct damages – nonpayment of supplemental retirement benefits.

13 There are two additional Sections of Measure B challenged in plaintiffs’ complaints, but
14 which are not addressed in the City’s motion for summary adjudication. Plaintiffs claim that
15 Section 1509-A illegally changes the Municipal Code definition of disability that entitles an
16 employee to a disability retirement. (*Sapien* Complaint ¶14(a); *Harris* Complaint ¶12(a); *Mukhar*
17 Complaint ¶14(a).) Plaintiffs also claim that Section 1510-A illegally authorizes the City to
18 suspend retiree COLAs in the event of an emergency. (*Sapien* Complaint ¶14(b); *Harris*
19 Complaint ¶12(b); *Mukhar* Complaint ¶14(b).) These two provisions of Measure B involve
20 different provisions of the Municipal Code, different legal issues and different potential damages,
21 respectively: denial of a disability retirement or suspension of a COLA payment. Accordingly,
22 they also involve separate and distinct alleged wrongs or breaches of contract.

23 Plaintiffs’ claims demonstrate that the challenged provisions of Measure B involve
24 different provisions of the Municipal Code, different alleged wrongs and breaches of contract, and
25 different alleged damages. Under the Code of Civil Procedure, plaintiffs’ contentions as to each
26 provision of Measure B constitute separate “causes of action” or “issues of duty.” The fact that
27 the City did not include all five of plaintiffs’ claims in its motion for summary adjudication does
28 not affect the viability of its motion.

1 **C. The Case Law Interpreting Section 437c(f)(1) Supports The City, Not**
2 **Plaintiffs.**

3 The above descriptions of plaintiffs' claims demonstrate that plaintiffs misapply the case
4 law interpreting Section 437c(f)(1). *Lilienthal & Fowler v. Superior Court*, 12 Cal.App.4th 1848
5 (1993) does not support their argument. In *Lilienthal*, the Court held that complaints of separate
6 instances of legal malpractice brought under one legal cause of action could be separately
7 adjudicated because they were "separate and distinct" wrongful acts with "different and distinct
8 obligations and distinct and separate alleged damages." *Id.* at 1854.

9 Plaintiffs argue they do not allege "separate and distinct wrongful acts, but that Measure B
10 violates the constitution for several different factual reasons." (Pl. Br. at 4.) They claim there is
11 "only one wrongful act, one cause of action presented by plaintiffs' complaints in this case." (*Id.*)
12 Although Measure B was enacted at one time, plaintiffs do not challenge all of Measure B, but
13 only particular sections. As demonstrated above, each section of Measure B at issue presents
14 separate and distinct issues and potential damages. In *Lilienthal*, as here, plaintiffs alleged
15 different illegal actions, but contended that each was illegal under the same legal theory. In
16 *Lilienthal*, the legal theory was legal malpractice; here it is violation of the Contracts Clause. It is
17 possible here, as in *Lilienthal*, for the Court to make a decision that completely disposes of one or
18 more alleged wrongful acts.

19 Contrary to plaintiffs' contentions, *Bagley v. TRW, Inc.*, 73 Cal.App.4th 1092 (1999) does
20 not "dispose of" the City's arguments. *Bagley* actually addressed a different issue – the
21 prohibition of consecutive motions for summary adjudication without new evidence or a change in
22 the law. *Id.* at 1092. In dicta, *Bagley* pointed out that Section 437c had been amended to provide
23 that a "motion for summary adjudication shall be granted only if it completely disposes of a cause
24 of action, an affirmative defense, a claim for damages, or an issue or duty." *Id.* at 1097, n.2.
25 Here, the City's motion for summary adjudication, if granted, would in fact "completely" dispose
26 of a cause of action or an issue of duty – the legality of the individual sections of Measure B
27 addressed by the City's motion. Each stands alone, and the Court can completely adjudicate one
28 or more without adjudicating every contention concerning Measure B in plaintiffs' complaints.

1 Moreover, *Bagley* distinguished *Lilienthal* as involving only “three requests for summary
2 adjudication” as opposed to the “one hundred and thirty separate summary adjudications”
3 requested in *Bagley*.³ Here, as in *Lilienthal*, the City is seeking summary adjudication as to only
4 three provisions of Measure B.

5 Plaintiffs fail in their attempts to distinguish other cases relied upon by the City. Again,
6 they confuse actions – alleged wrongs or violations of legal duty – that give rise to liability, with
7 the legal theory of liability. Plaintiffs contend that *Mathieu*, *supra*, 115 Cal.App.4th 1174, does
8 not support the City because the two claims in *Mathieu*, for sexual discrimination and retaliation,
9 involved different subsections of Government Code section 12940. (Pl. Br. at 5.) Plaintiffs argue
10 that, in contrast, they bring only one cause of action – impairment of contract. (*Id.*) The decision
11 in *Mathieu*, however, was not based on the existence of separate subsections of the Government
12 Code. Rather, citing *Lilienthal*, the Court relied on the existence of separate alleged wrongs,
13 explaining:

14 Both FEHA causes of action in *Mathieu*’s complaint assert two
15 grounds for liability: the initial hostile environment sexual
16 harassment by Fluck and retaliation for complaining about the
17 harassment. Those two separate and distinct grounds for liability
18 constitute separate cause of action for purposes of Code of Civil
19 Procedure section 437c, subdivision (f)(1).

20 *Mathieu*, 115 Cal.App.4th at 1188.

21 As in *Mathieu*, the City’s motion for summary adjudication addresses separate alleged
22 wrongs – the different and distinct provisions of Measure B.

23 Plaintiffs contend that *Garrett*, *supra*, 211 Cal.App.4th at 399 n.7, does not assist the City
24 because, in *Garrett*, the theories of defective design and defective manufacture, although alleged
25 under one count, “were two separate theories” and thus “could have been alleged in separate
26 counts, and therefore summary adjudication of the design defect claim was authorized since it

27 ³ In *Bagley*, plaintiff had alleged that he was not offered one of 24 available positions due to age
28 discrimination and other factors. Defendant had attempted to obtain summary adjudication,
person by person, of whether defendant offered each of the persons the positions for non-
discriminatory reasons.

1 disposed of a cause of action.” (Pl. Br. at 6.) Contrary to plaintiffs’ contentions, their claims also
2 could have been brought as different causes of action. Each section of Measure B involves
3 different Municipal Code sections, different alleged wrongs and breaches of contract and different
4 damages. Plaintiffs’ choice to litigate all sections of Measure B under one cause of action for
5 impairment of contract does not make all of Measure B one legal wrong.

6 Even if plaintiffs were correct in their interpretation of “cause of action” (which they are
7 not), Section 437c(f)(1) also permits summary adjudication of one or more “issues of duty.” In
8 *Linden Partners, supra*, the Court held that an “issue of duty” included an alleged breach of
9 contract. 62 Cal.App.4th at 519-520. The Court affirmed the trial court’s grant of summary
10 adjudication as to one issue of duty – the duty to deliver an estoppel certificate required by a
11 contract for purchase of a building – even though summary adjudication did not resolve the entire
12 lawsuit.

13 The Court concluded: “We believe it may fairly be concluded from settled authority and
14 upon a reasonable interpretation of legislative intent that if, under the facts and circumstances of a
15 given case, a court finds it appropriate to determine the existence or nonexistence of a duty in the
16 nature of a contractual obligation, it may properly do so by a ruling on that issue presented by a
17 motion for summary adjudication.” *Id.* at 519. The Court held that “on a motion for summary
18 adjudication, the court may rule whether a defendant owes or does not owe a duty to plaintiff
19 without regard for the dispositive effect of such ruling on other issues in the litigation, except that
20 the ruling must completely dispose of the issue of duty.” *Id.* at 522. This case is even stronger
21 than *Linden*, because here, adjudication of the issue of duty in favor of the City on a particular
22 section of Measure B would completely dispose of plaintiffs’ claim that the section impaired their
23 alleged contract with the City.

24 **D. The Recent Amendments To Section 437c Do Not Affect This Case.**

25 Plaintiffs claim that that the City is limited to proceeding under the new amendments to
26 Section 437c – subdivision (s) – which provide procedures for summary adjudication of issues that
27 do not completely dispose of a cause of action or issue of duty under subdivision (f).

28 ///

1 Subdivision (s) does not apply here. The *Garrett* case, decided in 2012 *after* the 2011
2 amendments took effect, relied on the line of cases beginning with *Lilienthal* and demonstrates
3 that they are still good law. *Garrett, supra*, 211 Cal.App.4th at 399 n.7. Moreover, there is
4 nothing in the legislative history of subdivision (s) that indicates it was intended to overrule the
5 *Lilienthal* line of cases.

6 The Bill Analysis for subsection (s) simply repeats the existing rule, stating that existing
7 law provides that “a motion for summary adjudication shall be granted only if completely disposes
8 of a cause of action, an affirmative defense, a claim for damages, or an issue of duty.” See
9 Request for Judicial Notice, Exh. A (Sen. Floor, analysis of Sen. Bill No. 384 (2011–2012 Reg.
10 Sess.) as amended Sept. 9, 2011.) The Analysis then summarizes the addition to the rule: “This
11 bill authorizes a motion for summary adjudication of a legal issue or a claim of damages other
12 than punitive damages that does not completely dispose of a cause of action, an affirmative
13 defense, or an issue of duty” (*Id.*) The Bill Analysis does not indicate any intent to change
14 existing law. (*Id.*) Existing law, as discussed above, holds that separate legal wrongs (or breaches
15 of contract) constitute separate “causes of action” or “issues of duty” and can therefore be subject
16 to a motion for summary adjudication. (*Id.*)

17 Similarly, no judicial decision supports the claim that Sen. Bill No. 384 was intended to
18 change prior law. In fact, no published appellate decision provides any guidance regarding the
19 proper use of subsection (s). Presumably, the new procedure could be used to obtain an early
20 determination as to evidence admissibility or the applicability of a damage claim’s statute of
21 limitations. Contrary to the City’s motion for summary adjudication, such limited requests that
22 focus on an evidentiary issue or a statute of limitations do not dispose of an alleged “legal wrong”
23 or “breach of contract.”

24 ///

25 ///

26 ///

27 ///

28 ///

1 **III. CONCLUSION**

2 Plaintiffs' motion is procedurally improper and should be denied for that reason alone. But
3 even if the Court reaches the merits, the City has properly moved for summary adjudication as to
4 individual provisions of Measure B. Each section of Measure B involves separate and distinct
5 legal issues and potential damages. Each stands alone, and the Court can completely adjudicate
6 the legality of one or more of these provisions without adjudicating the legality of other sections
7 of Measure B at the same time. For these reasons, each section of Measure B addressed in the
8 City's motion constitutes a separate "cause of action" or "issue of duty" that is subject to summary
9 adjudication under Code of Civil Procedure 437c(f)(1).
10

11 DATED: March 5, 2013

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AND

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ADMINISTRATION FOR THE 1961 SAN JOSE
POLICE AND FIRE DEPARTMENT RETIREMENT
PLAN
(Santa Clara Superior Court Case No. 112CV225928)

AND

Necessary Party in Interest, THE BOARD OF
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(Santa Clara Superior Court Case Nos. 112CV226570
and 112CV226574)

AND

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ADMINISTRATION FOR THE FEDERATED CITY
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(Santa Clara Superior Court Case No. 112CV227864)